



POLICE DEPARTMENT

July 9, 2018

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In the Matter of the Charges and Specifications : Case No.
- against - : 2016-15091
Police Officer Eric Duval :
Tax Registry No. 936537 :
Quartermaster Section :

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At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Javier Seymore, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: Michael Martinez, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

CHARGES AND SPECIFICATIONS

1. Said Police Officer Eric Duval, on July 26, 2014, while on-duty and assigned to the 6th Precinct, in the confines of New York County, wrongfully used force, in that without police necessity, said Police Officer pushed Individual 1 to the ground on two (2) separate occasions while she was in handcuffs.

P.G. 203-11, Pages 1 & 2

USE OF FORCE

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on June 6, 2018. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Department called Sergeant Patrick Romain as a witness. Respondent called Police Officer Jonathan Dones, Sergeants Joseph Cuervo and William Balunas as witnesses and testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent Not Guilty of the charged misconduct.

ANALYSIS

This case arises out of Respondent's arrest of Individual 1 for disorderly conduct in the early morning hours of July 26, 2014. Respondent, along with Officers Dones and Cuervo, was working an Impact overtime assignment, addressing quality-of-life infractions in the West Village. The officers were in uniform in an unmarked van with Cuervo operating and Respondent in the front passenger seat. Individual 1 was arrested around 1 a.m. after the officers observed her standing in the middle of the intersection of Bleeker and Christopher Streets, blocking traffic as she stood in the street, cursing and yelling at a motorist. Two other females stood near her. The conduct that led the officers to engage her is not in dispute nor is the validity of the arrest.

Upon arriving at the 6 Precinct stationhouse, Individual 1 was seen by EMT and transported to [REDACTED] Medical Center. Photos taken by IAB investigators who responded to the hospital were entered into evidence. They depicted abrasions to her chin and left cheek, injuries to her front bottom teeth, and heavy bandaging and dressing on her arm spanning from below the elbow to the fingers. (Dep't Ex. 3) Medical records indicated that Individual 1 complained that she was pushed or "bashed" to the ground, causing injury to her face and teeth and throbbing pain to her fifth right finger. A CT scan of her jaw showed loosening and angulation of the left medial and lateral mandibular incisors with posterior fracture of the associated alveolar sockets. An X-ray of her right hand confirmed nondisplaced fractures of the metacarpal bones in the fourth and fifth fingers. Her hand was placed in a splint. She was discharged after four hours with prescriptions for ibuprofen, Percocet and amoxicillin clavulanate, and instructions to follow up with an orthopedist and an oral surgeon. (Tr. 30, Dep't Ex. 4)

Over two months later, Individual 1 spoke with an ADA regarding her arrest. On the day of that interview, Sergeant Patrick Romain of IAB showed Individual 1 multiple photo arrays consisting of all the officers who had been present during her arrest, as well as fillers. Individual 1 was not able to successfully identify any of the officers who had been at the scene of her arrest. Ultimately, she ceased cooperating with the District Attorney's Office and later settled a civil lawsuit in connection with this incident for \$60,000.00. (Tr. 52-62, 178, 189; Res Ex. B).

At the precinct, Captain Daniel Morris generated a "49" report on the day of the incident based on interviews conducted with the officers present that night and made a preliminary determination that it appeared Individual 1 had been resisting arrest. However, due to the nature of her injuries, he recommended further investigation of the incident. (Tr. 50-51, 68-69).

Res Ex. A) The central issue for this tribunal is whether the injuries Individual 1 suffered were the result of Respondent's use of excessive force. Specifically, Respondent is charged with twice pushing Individual 1 to the ground while she was handcuffed.

Individual 1 did not appear to testify at trial, having not responded to multiple telephone calls and certified letters from the Department Advocate's Office. (Tr. 22) A transcript of her conversation with IAB investigators was entered into evidence. The conversation took place at approximately 0530 hours at [REDACTED] Hospital, four hours after the encounter with Respondent. She told the investigators that she had been crossing the street with her girlfriend and another friend after leaving a restaurant when a "random guy" in a passing vehicle tried to "hit on" them." Feeling "overprotective," she yelled to him to shut up and called him an asshole. Her girlfriend told her to calm down, but she acknowledged that she had consumed two margaritas and continued cursing "like really, really loud." She recalled that a van with "undercover cops came out of nowhere" and one officer, who she described as an average size white male with spiky hair who "looked like GI Joe," told her she needed to calm down. She continued cursing at the officers, also yelling that "cops...don't ever do anything." The officer, she contended, without asking for her identification, took out his cell phone and then slammed her face-down onto the sidewalk. She alleged that he put his knee on the back of her head and "pushed all his pressure on me," noting "there was all these cops around and everybody was standing." instead of intervening. She remembered imploring the officer multiple times, "please get off me, you're hurting me," but he "just kept pushing more pressure, more pressure" for a "couple of minutes." She also acknowledged making a reference to a "Staten Island cop." and asking if the officer was going to do the same to her. She stated she was not handcuffed at this time and believed this is when her hand was broken. (Dep't Ex. 1 at 3-8, 11-18, 23).

She recounted that when the officer did ask for ID, she readily stated it was in her back pocket. She contended she did not put up a fight because “when it comes to [cops], who’s gonna win,” but the officer still grabbed her to handcuff her, causing bruising, and “slam[ed] her on a brick wall.” She did not remember how she got back to the precinct. (*Id.* at 8-10, 16-17)

Individual I also spoke to an ADA on October 6, 2014, two and a half months after the incident. Sergeant Patrick Romain of IAB was present for that conversation. Though the conversation was not recorded, Romain later prepared a worksheet memorializing his recollection of the conversation. (Res. Ex. D) The worksheet detailed that Individual I stated that she, her girlfriend, Person A and Person B were crossing the street when a vehicle almost hit them. Individual I cursed at the car as it drove away. She also cursed at a male in a dark van, who told her to be careful and who she later realized was a police officer. Though she stated she was initially apologetic, Individual I admitted to the ADA that she refused to show her identification and was subsequently handcuffed and sat on the ground. She stated that she became angry and started commenting about police officers who had “just killed someone” in Staten Island. She claimed this angered the officer, who then took her ID out of her pocket and threw her to the ground, causing her to hit her face and “break” her arm. It was during this conversation that Individual I was unable to positively identify any of the officers who had been at the scene from photo arrays. (Res. Exs. B & D; Tr. 50-65, 71).

Sergeant Romain of IAB also spoke to Individual I’s then-girlfriend, Person A by phone on August 1, 2014.¹ (Dep’t Ex. 5; Tr. 31, 66-67) During that conversation, she recounted that on the night of the incident, after leaving a bar, she, Individual I and a friend were crossing the street when a male in a car sped up toward them and said “something to her,”

¹ Prior to trial, the Department Advocate’s Office reached out to ██████████ who indicated she was no longer in a relationship with ██████████ and did not wish to discuss the incident with the Department. (Tr. 32)

causing Individual I to begin cursing. A passenger in an unmarked van stopped at a red light rolled down his window and called to the women that they were not supposed to be crossing with the green light. Individual I retorted, "I see you. What are you gonna do about it?" and multiple uniformed officers emerged out of the van. Realizing they were dealing with police officers, Person A apologized. As the officer who had been in the passenger seat approached Individual I and took out handcuffs, Person A implored, "please don't arrest her," as Individual I moved back and asked why she was getting arrested. The officer handcuffed her, and then "[took] her down, sat her down on the floor." Individual I began cursing again and brought up "the whole thing that happened in Staten Island" as Person A urged her to be quiet. As the officer lifted her to her feet to take her to the police vehicle, Person A detailed,

"[Individual I] like stumbled . . . or wobbled and I guess he felt like she was trying to . . . shove or something...he lift[ed] her up and like slam[ed] her to the floor." Feeling the officer was being too aggressive, Person A tried to intervene, attempting "to grab him," but the officer shoved her back by making contact with her neck. (Dep't Ex. 5 at 3-12)

Person A then went to the precinct to see if she could take Individual I home. She spoke to an "older" supervisor who said he had been at the scene and saw Individual I throw herself on the ground. Person A insisted that this officer had not been at the scene and asked, "how could she throw herself on the floor if she was [handcuffed?]" (*Id.* at 13-15)

An IAB investigator also briefly spoke with Individual I's friend Julissa Rivera, who similarly recounted that they were crossing Christopher Street after leaving a bar when a male in a van made a comment "like hitting on Individual I's girlfriend." Individual I cursed at the man. The van then stopped and a "whole bunch" of police officers exited. She contended that "they just came at [Individual I], like running to her and pushed her down." Specifically, she claimed that one officer, who she did not describe, "knead [Individual I] down"

after she was handcuffed, and generally acted “really aggressive[ly] with her.” (Dep’t Ex. 2 at 2-7).

Respondent ardently denied allegations of aggressive behavior on his part, contending that he used only the force necessary to effectuate the arrest of a belligerent and resistant individual. He recounted that when he first saw Individual I, she was standing in the street screaming profanities at a vehicle, which had the right of way but was blocked from proceeding by Individual I for at least 30 seconds. Respondent leaned out the police van’s passenger window and told her, “Get out of the street. He has the right of way.” Individual I, who Respondent acknowledged may not have realized he was a police officer at this point, responded, “Fuck you, mind your own business,” and continued to curse. (Tr. 147-49)

Respondent and Dones exited the van and, from the sidewalk, he called to Individual I to get out of the street and beckoned for her to come over to him. She continued yelling, telling him “Fuck you,” multiple times. Respondent stated he did not feel disrespected by her words, pointing out that he is regularly cursed at as a police officer. He asked for her ID multiple times, which she refused to give him. He explained that his initial objective in stopping her was to get her to calm down and let traffic proceed. Respondent implored her, to “just give [him the] ID... all I’m going to do is write you a summons...if you don’t I’m going to have to take you in.” Individual I replied “Fuck you, I ain’t giving you shit.” He asked a final time and she repeated, “Fuck you, I ain’t giving you shit.” When asked on cross-examination why he did not use discretion and simply let her walk off, he explained he did not believe that would have been doing his job given the commotion she had created. (Tr. 150-52, 168-70)

Respondent then attempted to handcuff Individual I by grabbing her arm, but detailed that she “went ballistic. She started turning, screaming, flailing her arms. I tried to get a cuff on her. I couldn’t. The only thing I could do was brace her up against something, take her to the

ground and this way I could get the arms behind her back. Because the way she was spinning, every time I tried to grab her arm, she [spun] the other way. It was impossible to get both of her arms and cuff her at the same time." He testified that he grabbed her arm and "pulled her down with [him] to get her onto the ground." He demonstrated to the tribunal that he grabbed her forearm and pulled her down with him, kneeling with his knees to the side, perpendicular to and over Individual I holding her down with both hands. He insisted that he did not put either of his knees on her back or head and did not strike her. He further emphasized that he "absolutely" did not tackle her and did not land on top of her, asserting he made no contact with her body other than holding her arm behind her back. Respondent acknowledged that he took her to the ground face down, but testified that no part of her body slammed into the concrete. (Tr. 152-55, 172)

After Dones assisted him in handcuffing Individual I, they sat her up and placed her against a wall where she continued loudly cursing. Respondent denied pushing her into or against the wall. He saw no visible injuries and stated that she did not complain about being injured. When Sergeant Balunas, who Respondent did not recall working with previously, arrived at the scene to verify the arrest, Respondent spoke to him about what had transpired. Balunas directed him to pick up Individual I and put her in the RMP. Respondent and Cuervo helped her up from the ground. Once she was upright, Respondent continued to hold onto her arm, but testified that as they began walking, she pulled away from him and started kicking, "back kicking me and twisting her upper body violently." He explained that he arched backward and, with one arm extended, forcefully held her away from him to avoid being kicked in the knee or the groin. He used his other arm to cover his groin area. Respondent stated that Individual I made only "very minimal contact" with his leg. She then jerked her shoulders forward, causing him to shift off balance, and "violently" pulled out of his grasp. He firmly

denied intentionally releasing her arm. Respondent recounted that as Individual I pulled out of his grip, she immediately fell to the ground face first, making contact with the concrete. He and Cuervo quickly picked her up, each grabbing one arm, and Balunas, who was only a few feet away, directed that they walk her the one block to the precinct. (Tr. 155-62, 175-77)

As they walked, she "calmed down a little bit" and Respondent noticed cuts around her chin and eyes and bleeding around her mouth. Individual I was transported to the hospital and Respondent spoke to the duty captain about what had happened. As the arresting officer, he also spoke with the ADA by phone about the criminal complaint. He did not recall conversing with anyone else about the incident. (Tr. 162-65; Res Ex. E)

Finally, Respondent reiterated that he absolutely did not, at any point, push Individual I to the ground while she was handcuffed, slam her into a wall, knee her, kick her or strike her. He testified that he was unaware that Individual I had settled a lawsuit with the City in connection with this incident. (Tr. 166, 178)

Respondent's partners on the tour, Police Officer Jonathan Dones and Sergeant Joseph Cuervo (a police officer at the time of the incident), also testified, corroborating significant portions of Respondent's account. Both officers recalled observing Individual I, accompanied by female companions, yelling profanities and blocking a vehicle's ability to proceed at the intersection of Bleeker and Christopher Streets. Cuervo remembered Respondent calling to the women to quiet down and Individual I yelling back at him. Dones and Respondent then exited the vehicle while Cuervo parked. Dones testified that Respondent approached her first and, from the sidewalk, asked for her ID, which she refused to turn over. When Respondent warned she would be arrested if she did not present identification, she again refused. (Tr. 78-81, 94, 104-07).

Dones testified that as Respondent, who was standing next to him, went to handcuff Individual I she pulled away, causing him to take her to the ground, "us[ing] force but not extreme force." He denied seeing Respondent slam her to the ground and described that "pretty much they fell [to the ground] together." On the ground, Respondent was "over" Individual I but not "totally on top of her." Dones did not see where Respondent's knees were. He moved toward them and helped Respondent put her in handcuffs. Dones and Respondent then sat her up, against a building, and called Balunas. Dones did not observe any injuries to her at this time and Individual I, who continued to yell and scream, did not complain of any injuries. Cuervo concurred, explaining that by the time he parked and caught up with his fellow officers, Individual I was rear cuffed, sitting on the ground against a building, continuing to curse and act "a little belligerent." He did not do a full body scan for injuries, but asserted that there were no visible injuries to her face or arms. (Tr. 83-85, 95-97, 103-09)

Dones recounted that Cuervo and Respondent then attempted to stand Individual I up and move her into the police vehicle. After she was upright, Cuervo let go and "left it to [Respondent]" to put her in the van. Cuervo and Dones testified that within a few seconds, she twisted her body, trying to "wiggle" or "run away" from Respondent, and then began kicking at him. They similarly detailed that Individual I broke free² from Respondent's grip with handcuffs still on, but after moving just a few feet, she fell to the ground, landing her on face. Cuervo specifically stated on cross-examination he did not see Respondent use any force against Individual I prior to her fall. (Tr. 86-90, 97-98, 111-14, 120-22)

² Dones acknowledged that at his GO-15 interview, he stated that Individual I was "released" from Respondent's grip, but at trial, he maintained that she "broke free" from the grip and explained that he had used the terms interchangeably. (Tr. 98-99) Similarly, Cuervo described Respondent as "releasing" Individual I's arm at his GO-15 interview, but explained at trial that "whether he let go or she got away from his grasp, I can't tell you." He emphasized that all he observed was that in the seconds before she fell, Respondent was no longer holding Individual I's arm. (Tr. 120-21)

Both officers stated that Sergeant Balunas directed them to walk Individual I to the precinct, which was a block away. Cuervo explained, "The way she was acting, I don't think she was going to be going in a RMP." As they walked, Dones noticed that Individual I was bleeding from the mouth and appeared to have injured her teeth. He did not examine her arms or shoulders. EMT arrived at the precinct soon thereafter and the officers had no further interaction with Individual I. (Tr. 86-90, 92, 95-100, 115)

Cuervo did not remember if he spoke with Respondent about the incident prior to his official Department interview, but noted he was off the day after the incident. He stated that he had worked with Respondent for about a year at that point and suggested they may have socialized two or three times. He was promoted to sergeant approximately two years ago and transferred out of the 6 Precinct. Dones testified that he recapped what he had observed during the arrest to the Manhattan DA's Office and IAB, but had no discussion with Respondent about the encounter. He stated that he had worked with Respondent prior to the incident as part of the Impact team but had never socialized with him at that point.³ (Tr. 91-93, 115-18)

Finally, Sergeant William Balunas, the Impact supervisor at the time of the incident, was called by Respondent to testify. Though Balunas was Respondent's supervisor on that night while working an overtime tour, Respondent was never in his squad or under his direct supervision, as Respondent was assigned to Conditions and Balunas typically worked "inside" in the Crime Analysis Unit. He received a call after 1 a.m. asking him to respond to the intersection of Bleeker and Christopher Streets. On arrival, he observed Individual I sitting up against a building. She was yelling and screaming, "being very belligerent," but did not appear injured. He conceded, though, that the lighting was "not great," and he did not really

³ Dones indicated he and Respondent had "hung out" socially once or twice following the incident, but not "in a long time." (Tr. 92)

look at her face, arms or shoulders. He spoke with Respondent, who explained that she had been yelling in the street, blocking vehicular traffic and refused to present ID. After hearing this explanation, Balunas verified the arrest and told the officers to transport her back to the command in their van. (Tr. 125-29, 136-38)

From five feet away, he watched Respondent and Cuervo help her to her feet, each holding one arm, and then saw her twist her body to the right and abruptly kick her right leg toward Respondent. Respondent, he recounted, stepped back to avoid being struck but maintained his grip on her arm. Balunas explained that Individual I then swung right with her shoulders and momentarily broke free or "slipped" from Respondent's grasp. As she did so, her left leg came out from under her and she fell face forward onto the ground. Balunas specifically stated on cross that Respondent "definitely did not push her away." He also did not believe there was anything inappropriate about how Respondent was holding Individual I's arm. (Tr. 129-32, 139-42)

Balunas observed Respondent and Cuervo rush to help her up and when they lifted her upright, he saw that she was bleeding from the face, specifically the chin area. From Christopher Street, Balunas contacted the duty captain, advising that an individual had been injured during a police encounter, and called for EMS to respond to the precinct. He directed the officers to walk Individual I the one block to the precinct, explaining that he believed it would be safer than the close quarters of a vehicle, given her combative behavior. At the precinct, he briefed the duty captain, who was also the Executive Officer for the command, on what had transpired. He subsequently spoke about his observations of the incident at a GO-15 interview and with the Manhattan DA's Office. (Tr. 132-35)

Few things are more difficult, yet more fundamental to the role of a trier of fact, than attempting to reconstruct past events on the basis of opposing accounts. In a hearsay case of this

nature, particular attention must be paid to the evidence. This tribunal has held many times that while hearsay is admissible in administrative proceedings, and may be the sole basis for a finding of fact, it must be carefully evaluated before it is relied upon. Factors such as corroboration, consistency, bias, logic and the degree to which an account comports with common sense and general human experience must be taken into account. Having carefully considered the trial testimony, the unsworn statements of Individual I and her companions proffered by the Department, the medical records and the related photographs, I find that the Department has failed to prove by a preponderance of the credible evidence that Respondent wrongfully pushed Individual I to the ground on two separate occasions while she was in handcuffs.

The applicable section of the Patrol Guide at the time of the incident, section 203-11, cautions that "excessive force will not be tolerated." An officer at the scene of an incident is directed to "use minimum necessary force." The section also notes that when taking a violent or resisting subject into custody, "officers should utilize appropriate tactics in a coordinated effort to overcome resistance."

It is undisputed, based on the hospital records and photos in evidence, that Individual I suffered multiple injuries during her encounter with Respondent - fractures to two of her fingers, fractures to two tooth sockets and abrasions to her face. Because of the nature of these injuries and the notifications made by Sergeant Balunas, an investigation into the encounter commenced before Individual I left the hospital. That investigation yielded just one specific charge of misconduct here, and the narrow question here is whether the record has established that Respondent twice pushed her to the ground while handcuffed and without police necessity. For the reasons set forth below, the tribunal finds that the record does not establish that Respondent engaged in the charged misconduct or employed any excessive force against Individual I.

The Department Advocate relies primarily on the hearsay statement Individual 1 gave to IAB investigators while still at the hospital and on telephonic statements from her then-girlfriend and friend provided in the days after the incident. Individual 1's unsworn statement raises more questions than it answers. She essentially admitted to disorderly conduct, recounting that she was "cursing like really, really loud" at a vehicle in the intersection and that she also cursed at Respondent who implored her to calm down. She alleged that Respondent, who she specifically stated did not initially ask for ID, exited the van, took out a cell phone and "just slammed her [face-down] on the floor," placing his knee on her head "pushing all his pressure on [her]," even though she was putting up no fight and calling out that he was hurting her. She also contended that she kept cursing during this part of the encounter, also bringing up the "Staten Island cop," and asking if [Respondent] was going to "do me like he did." When she said this, "he just put me in more pressure... [it] felt like more intense." She claimed this continued for "a good couple of minutes," during which time she believed she broke her fingers, as multiple other officers stood around not doing anything. Finally, she alleged that Respondent handcuffed her and slammed her against a brick wall.

Individual 1's account of events strains almost all credulity, requiring the tribunal to believe that Respondent, who by her own narrative, initiated the encounter by simply asking her to calm down, would, as the result of a few curse words, slam her to the ground without first asking for ID or attempting to handcuff her, and then use his knee to press her head into the ground for a matter of minutes while other officers mulled about, not intervening. Respondent's counsel was deprived of the opportunity to probe Individual 1 on cross-examination about the more dubious aspects of her account of events and the tribunal was not able to pose questions that might have provided some clarification.

Individual I's reliability as a narrator is further called into question by her inability to select even one officer who was at the scene from a photo array, her admission that she made comments at the scene about police never doing anything and references to the "Staten Island cop," which indicate a potential bias against police officers, as well as her settlement of a civil lawsuit, after which she appears to have ceased all cooperation with the District Attorney's and the Department's investigations of this incident. While none of these factors alone are fatal to credibility, they are certainly ripe territory for cross-examination, just as the opportunity to observe Individual I's demeanor in answering these questions might have been illuminating for the tribunal.

The only corroboration for Individual I's account of events, to some extent, comes from a telephonic statement from her then-girlfriend and another very brief telephonic statement from a friend. Given their relationships to the complainant, the potential for bias or willingness to align with Individual I's version of events is inherent. With telephonic statements, there is also greater potential for witness coaching, and the questioner is not given any opportunity to observe how the witness reacts to certain questions.

Even so, the accounts from her friends also differ from that of Individual I in certain aspects. Where Individual I claimed Respondent simply took out his cell phone and slammed her to the ground without giving any indication that she was under arrest, her girlfriend, Person A, recalled that he took out his handcuffs and Individual I moved back from him and asked why she was being arrested. Person A recalled, "He handcuffed her, he takes her down, he sat her down on the floor" in contrast to Individual I's statement that she was not yet handcuffed when she was first taken to the ground and then slammed into a wall. Person A also said nothing about any officer kneeing her girlfriend or applying pressure to head for several minutes. In contrast to Individual I, who had no memory of being stood up or walked to the

precinct, Person A recounted that when Respondent stood her upright, she “wobbled” and the officer “I guess... felt like she was trying to shove,” causing him to slam her to the floor. Person A also stated that as this was transpiring, she was “crying like crazy” at this point, giving the tribunal pause about the clarity of her memory of the specific events.

Ms. Rivera, whose statement was incredibly brief and lacked any real detail, claimed, unlike the other two women, that it was men in the police vehicle whose comments toward Person A caused Individual I to initially become angry. She further asserted that multiple officers then exited their vehicle and ran at Individual I, pushing her down, with one officer also kneeing her.

While Individual I’s injuries provide some limited support for her contention that force was used against her, these hearsay statements are fraught with inconsistencies, potential bias and a general narrative of an officer using significant force against a woman who was not physically resistant without making any effort to deescalate the situation or explain why he was attempting to arrest her. In sum, these hearsay allegations lack the ring of truth. Without the benefit of live testimony where these witnesses could have rehabilitated, clarified or explained some of the issues with their stated narratives, the tribunal cannot rely on these statements as a foundation for a finding of excessive force.

Conversely, Respondent and the three uniformed officers who were at the scene presented a consistent and logical narrative, persuading the tribunal that while Individual I did sustain injuries during a physical altercation with Respondent, such injuries were not the result of any excessive force or misconduct on Respondent’s part. Preliminarily, I note that while Respondent and Officers Dones and Cuervo had worked together as part of the Impact team previously, there was no evidence of any long-term friendship or steady partnership between Respondent and these officers, and no information indicating they had, as the

Department suggested, communicated "to get their stories together" regarding Individual I's conduct. Moreover, there was absolutely no indication that Respondent and Sergeant Balunas had ever worked together before this, as Balunas explained he was working an overtime tour, separate from his usual "inside" assignment. None of these officers were charged with misconduct and the tribunal finds no real motive for them to fabricate their versions of events in order to aid Respondent.

I credit Respondent's testimony that he asked for Individual I's ID with the primary objective of getting her to calm down and stop blocking the flow of traffic. When she did not present it after multiple requests, a fact corroborated by Officer Dones, Respondent reasonably explained that he moved to take her arm and effectuate a lawful arrest for disorderly conduct. Given Individual I's admission that she was cursing "really loud" and her "belligerent" demeanor that all of the officers testified to, Respondent and Dones' testimony that she pulled away from his attempt to handcuff her is highly plausible. It is also corroborated to some extent by Person A's hearsay statement that Individual I moved back in response to Respondent's approach and asked why she was being arrested.

It is not disputed that Respondent then took Individual I to the ground. Having had the opportunity to observe his demeanor as he turned to directly address the tribunal as he carefully explained exactly how he did this, the tribunal found Respondent to be sincere and forthright as he detailed how he was unable to handcuff her because she started flailing and turning her body, recounting, "every time I tried to grab her arm, she [spun] the other way. It was impossible . . ." He demonstrated that he grabbed her forearm and pulled her down with him, careful to place his knees to the side of her, and landed over but not on top of her. Though he was obviously an interested witness in this matter, he struck the tribunal as both genuine and completely professional as he firmly denied certain conduct-- kneeing, striking or slamming her

body-- but also attempted to provide a clear picture of the force he had used to effectuate the arrest of a noncompliant complainant. His account was almost entirely corroborated by Dones' statements that Respondent used "force but not extreme force" to take Individual I to the ground, that he did not slam her, and that he landed over but not "totally on top" of her. I find the officers' testimony that, after handcuffing Individual I they sat, not slammed or pushed, her against a nearby building while they waited for Sergeant Balunas to verify the arrest similarly credible. The tribunal also notes that all uniformed witnesses saw Individual I sitting against the wall and all testified that she did not appear injured at this time, though Respondent, Dones and Balunas acknowledged observing injuries at a later point in the encounter.

With respect to the second time Individual I made contact with the ground, Dones, Cuervo and Sergeant Balunas were all present and they, along with Respondent, all provided essentially the same account that as Respondent was attempting to walk her to the police van, she began kicking him. On direct examination, Respondent, again turning to directly address the tribunal, credibly explained and demonstrated how he extended his arm so as to hold her back and prevent the kicks from making contact with his knee or groin. When pressed on cross as to whether he "use[d] force to extend [his] arm to push her away from [him] [as she kicked]."
Respondent, instead of outright denying any use of force, agreed, "You would have to...you would have to extend your arm." (Tr. 176-77) He also confirmed that her kicks made only light contact with his leg, making no self-serving allegation that she injured him. Sergeant Balunas provided strong support for this particular part of Respondent's account, testifying decisively and without hesitation, "No, he definitely didn't push her away." All four officers testified that the rear-cuffed Individual I then twisted or jerked her upper body, causing Respondent to briefly lose his grasp on her and Individual I to almost immediately fall face-first onto the concrete.

When the officers helped her up, Respondent, Dones and Balunas confirmed that she was injured and bleeding in the face and mouth areas, causing Balunas to call both the duty captain and EMS. This adherence to notification protocol allowed for the IAB investigation to commence before Individual 1 even left the hospital.

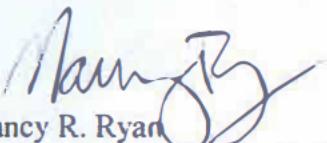
Based on the narrative provided by the officers, it seems highly plausible, perhaps even likely, that Individual 1, who by her own admission had consumed at least some alcohol and was yelling in an agitated manner, sustained her injuries by trying to break free from Respondent's grasp, losing her balance, and taking a hard fall face-first onto the concrete. Ultimately, though, it is not Respondent's burden to determine exactly how the injuries were sustained. While Respondent and the other uniformed witnesses provided highly credible and professional testimony and established a narrative of events that makes logical sense, the burden lies with the Department to establish by a preponderance of the credible evidence that Respondent engaged in the charged misconduct. For the reasons outlined above, the tribunal finds this record is devoid of credible evidence that Respondent twice pushed Individual 1 to the ground while she was handcuffed. Accordingly, I recommend that he be found Not Guilty.

APPROVED

AUG 30 2018

JAMES P. O'NEILL
POLICE COMMISSIONER

Respectfully submitted,


Nancy R. Ryan
Assistant Deputy Commissioner Trials